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Supreme Court of the United States

October Term, 1990

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

v.

ROBERT L. DOWELL *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF THE AMERICAN JEWISH COMMITTEE, THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE NATIONAL COUNCIL OF LA RAZA, THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, THE UNITARIAN UNIVERSALIST ASSOCIATION AND THE YWCA OF THE U.S.A. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

SAMUEL RABINOVE
Counsel of Record
RICHARD T. FOLTIN
The American Jewish Committee
165 East 56th Street
New York, New York 10022
(212) 751-4000
Attorneys for Amici Curiae

Of Counsel:
WILLIAM B. DUFFY, JR.
BURNS & LEVINSON
125 Summer Street
Boston, Massachusetts 02110

RUBEN FRANCO
PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND
99 Hudson Street
New York, New York 10013

STANLEY MARK
ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND
99 Hudson Street
New York, New York 10013

QUESTION PRESENTED

Whether a school district with a history of de jure segregation may unilaterally abandon a court-ordered desegregation plan for elementary school students while residential segregation caused in part by past unlawful state action ensures that inner-city neighborhood schools would be virtually all-black.

STATEMENT OF INTEREST

The American Jewish Committee, founded in 1906, seeks to protect the security and constitutional rights of Jews in America through the preservation of the rights of all Americans. We have been concerned with the inequities of segregated schooling since the late 1940's, when we sponsored research on the effects of de jure segregation. This research was later cited by the U.S. Supreme Court in *Brown v. Board of Education*, 347 U.S. 483, 494 n.11 (1954). AJC was *amicus curiae* in both *Brown* and *Keyes v. School District No. 1*, 413 U.S. 189 (1973), and we view the instant case as critical to the preservation of the principles established in those cases.

The Asian American Legal Defense and Education Fund is a national civil rights organization that addresses the critical problems facing Asian Americans. Our civil rights priorities include anti-Asian Violence, Immigrant Rights, Voting Rights, Labor and Employment Rights, and Redress for Japanese Americans incarcerated in camps during World War II. The Oklahoma City school system has yet to uproot the vestiges of de jure segregation and achieve a unitary school system. Continuing desegregation efforts in education must be maintained to achieve equal opportunity in education for minority Americans who, like African

Americans, were compelled to attend segregated schools. *Gong Lum v. Rice*, 275 U.S. 78 (1927).

The National Council of La Raza is a non-profit, tax-exempt corporation dedicated to improving life opportunities for the more than 20 million Hispanics in the United States. NCLR represents over 120 affiliates, which are community-based organizations serving the Hispanic community in 32 states and the District of Columbia. As a long time advocate of Hispanics' rights to equal educational opportunities, we oppose the weakening of the hard-won remedial procedures currently in place which work to resolve long-standing educational discrimination.

The Puerto Rican Legal Defense and Education Fund, Inc. (PRLDEF) is a national civil rights organization representing Puerto Rican and other Latinos. PRLDEF is and has been counsel to the Latino community in a number of school desegregation cases in the Northeast. The issue presented in this case is vital to the continued success of several ongoing desegregation efforts and the provision of quality education.

The Unitarian Universalist Association is a religious organization consisting of over 1000 member churches and 100,000 members located throughout the country. It intervenes in cases where racial justice concerns and principles are importantly at issue.

The YWCA of the U.S.A. is a national membership organization whose mission is the elimination of racism and the empowerment of women. As adopted by its national convention, the YWCA supports "measures to assure the full compliance and vigorous enforcement of laws requiring desegregation of the public schools."

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STATEMENT OF THE CASE

Amici adopt the factual presentation set forth in the Respondents' Statement of the Case.

This brief is submitted with the consent of the parties.

SUMMARY OF ARGUMENT

Any discussion of when a formerly segregated school district is to be declared "unitary" must begin with this Court's long-standing requirement that dual school systems be eliminated "root and branch," which entails the elimination of "all vestiges" of past de jure segregation. Courts must be hesitant to abandon supervision of school districts because of the extreme difficulty that future plaintiffs will have in proving that future school segregation results from the school board "deliberately attempt[ing] . . . to affect the racial composition of the schools." *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 32 (1971). A school district can, therefore, only achieve unitary status if the school board demonstrates by clear and convincing evidence that it has faithfully complied with the desegregation order, that it has taken no recent actions with segregative intent, and that all significant vestiges of past segregation have been eliminated.

In this case, inner-city neighborhood schools which are more than 90% black are the result of a continuing pattern of residential segregation. The segregated character of Oklahoma City schools thus is a significant vestige of the previous governmental policy of racial separation and precludes a finding of unitary status. The trial court's use of the term "unitary" in its 1977 ruling did not indicate a finding of unitary status, but rather that continuing compliance with the desegregation order was successfully causing the district to operate in a non-discriminatory manner.

This Court has consistently held that school desegregation cases are governed by traditional equitable principles. Under these principles, an injunction cannot be dissolved against the will of the prevailing party unless it has fully accomplished its purpose and no

significant risk remains that the injury that required the injunction will recur. Moreover, these standards serve the same concerns of fairness and judicial efficiency that have led this Court to announce a policy of "rigorous application of *res judicata*." The state of residential segregation in Oklahoma City and the drastic resegregation of schools under the neighborhood attendance plan indicate both that the plaintiffs have thus far achieved only partial relief, and that the risk of reversion to separate and unequal schools is still present.

Extensive study of desegregation has produced a stable consensus among social scientists: desegregation has important long- and short-term benefits to minority students and to our society as a whole, without harm to the education of white students. Despite the efforts of opponents of complete desegregation to show that desegregation is either impracticable, ineffective or counter-productive, social scientists now recognize its important long-term remedial effects. Desegregation measurably improves racial tolerance in all parts of our society; it allows minority students to break the cycle of segregation that otherwise limits them to isolated, second-class lives; and it speeds the process of residential integration. Over the short term, desegregation achieves its immediate aim of improving the education of minority students, provided it begins by first grade — as it did in Oklahoma City before petitioner unilaterally abandoned the desegregation plan.

ARGUMENT

I THE OKLAHOMA CITY SCHOOL SYSTEM HAS NOT ACHIEVED UNITARY STATUS

A. *Green* And Its Progeny Require That A Formerly Segregated School District Completely Remedy Its Past Constitutional Violation.

The U.S. Supreme Court has consistently insisted that half-way remedies for de jure segregation are not acceptable. Segregationists' hopes that school districts could constitutionally tolerate the vestiges of segregation ended with *Green v. County School Bd.*, 391 U.S. 430 (1968), which declared that school systems are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination has been eliminated root and branch." *Id.* at 437-38.

Subsequent decisions of this Court have reaffirmed that standard. Thus, *Davis v. Bd. of School Comm'rs of Mobile County*, 402 U.S. 33 (1971), demanded that "school authorities . . . make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Id.* at 37. *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*), explicitly referred to the elimination of "*all vestiges* of state-imposed segregation," *id.* at 290, quoting *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (emphasis added), while *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979), cited *Swann* and *Green* for the proposition that remedial efforts are necessary "until it is clear that state-imposed segregation has been *completely* removed." *Id.* at 459, quoting *Swann*, 402 U.S. at 13 and *Green*, 391 U.S. at 439 (emphasis added).

The reference to the "practicalities of the situation" in *Davis* in no way dilutes this standard. Rather, the Court recognized that, because an injunction must serve a remedial purpose, district courts need not seek total desegregation where local geographic or demographic conditions doom that attempt to failure. *See Morgan v. Nucci*, 831 F.2d 313, 320 (1st Cir. 1987) (exempting part of Boston from a desegregation plan due to its geographical isolation); *Bradley v. Milliken*, 484 F.2d 215, 245 (6th Cir. 1973), *rev'd on other grounds*, 418 U.S. 717 (1974) (finding that the large minority population of Detroit precluded a Detroit-only remedy).

B. The Difficulty Of Proving Anew That Actions With A Segregative Effect Result From A Discriminatory Purpose Requires That School Boards Meet Exacting Standards Prior To The Termination Of Court Supervision.

Before a formerly segregated school system achieves unitary status, there is a rebuttable presumption that actions with segregative results were taken with discriminatory intent. "[T]he Board has a 'heavy burden' of showing that actions that increased or continued the effects of the dual system serve important and legitimate ends." *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979) (*Dayton II*), quoting *Green*, 391 U.S. at 439. In contrast, after a system becomes unitary, plaintiffs may only win further relief by showing that the school board "deliberately attempted . . . to affect the racial composition of the schools." *Swann*, 402 U.S. at 32. This heavier burden reflects the general rule, set out in *Washington v. Davis*, 426 U.S. 229 (1976), that a state action is not unconstitutional merely because it weighs disproportionately on one group. This Court's adoption of heightened scrutiny of school districts so long as

vestiges of de jure segregation remain is necessary to protect the rights of minority students. It reflects both a justifiable caution that districts with a history of de jure segregation will have a tendency towards future discriminatory actions and a recognition of the difficulty of meeting the discriminatory intent standard.

Given the discriminatory intent standard, a premature finding of unitary status creates an unacceptable risk that minority students will suffer a wrong without a remedy. So long as no evidence of discriminatory intent appears in a public record, minority parents may have no basis to challenge facially neutral school board policies that result in their children attending neighborhood schools that are 99% black and educationally inferior. Already in this case, for example, the Board adopted a facially neutral plan for teacher transfers that caused substantial resegregation of the faculty. *Dowell v. School Bd. of Oklahoma City*, 890 F.2d 1483, 1500 (10th Cir. 1989), *cert. granted*, 108 L.Ed 2d 761 (1990). While a voluntary affirmative action plan ended the resegregation (after this litigation had begun), petitioner could take other "neutral" actions in the future to the disadvantage of minority students. For instance, the Board could resegregate grades 5-12 through a "neighborhood schools" plan or abolish the equity committee that ensures that inner-city schools do not become inferior.

It may be that when black and white students attend the same schools, courts need no longer fear that school districts will treat minority students inequitably, because the Equal Protection Clause "requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan v. Missouri*, 58 U.S.L.W. 4916, 4926 (1990) (Scalia, J., concurring). In areas where schools remain highly segregated, however, that requirement provides no protection, because policies which allow minority-dominated schools to deteriorate do not affect the children of the white majority. Given the deplorable state of allegedly

"separate but equal" schools for blacks in the pre-*Brown* era, a fear that significant inequities could again emerge is justified.

The Court has often recognized the difficulty of proving discriminatory intent in multi-member government bodies. *See, e.g., Hunter v. Underwood*, 471 U.S. 222, 228 (1985); *Wright v. City of Emporia*, 407 U.S. 451, 462 (1972). This burden is compounded by several factors present in the case at bar. First, the day has long passed when racism is likely to be explicit in the record, as in *Hunter*, 471 U.S. at 229-31, and *Palmer v. Thompson*, 403 U.S. 217, 250-51 (1971) (White, J., dissenting). "[I]n an age when it is unfashionable for state officials to openly express racial hostility, direct evidence of overt bigotry will be impossible to find." *U.S. v. Bd. of School Comm'rs*, 573 F.2d 400, 412 (7th Cir. 1978), *cert. denied*, 439 U.S. 824. This is especially true for school boards previously under court supervision, which are keenly aware that their public records may be scrutinized in a search for invidious intent.

Second, prior school desegregation plaintiffs have been able to base their cases on the existence of a dual school system as of this Court's decision in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (*Brown I*), because school boards had an "affirmative duty" to remedy the past constitutional violation. *Columbus*, 443 U.S. at 458-59. This rule, critical to desegregation efforts in many cities, no longer applies after a finding of unitary status, which indicates that the board has indeed fulfilled that obligation. Thereafter, efforts to demonstrate illegal segregation become far more difficult than they had been in the past.

Third, this Court has recognized the number and complexity of factors that a school board must consider regarding school construction and student assignments. *Swann*, 402 U.S. at 20. In this context, a school board may often be able to advance plausible, non-invidious

justifications to conceal discriminatory actions.

Finally, in this age of extensive discovery, out-of-town experts and lengthy trials, a suit seeking to prove segregative intent is tremendously costly. Future plaintiffs, particularly in small rural school districts, will have great difficulty obtaining the funds to support an attempt to meet this standard.

Petitioner is wrong when it seeks to reassure this Court that, should the School Board take any future action with an intent to disadvantage the minority community, respondents will easily be able to prove an unconstitutional purpose. Brief of Petitioner at 31-32. As the Court has stated in another context, "[t]he difficulty of ferreting out these evils . . . supplies an additional reason why we should leave the defendants where we find them [with the injunction in place]." *U.S. v. Swift*,, 286 U.S. 106, 119 (1932).[1] Therefore, a school district with a history of discrimination must meet highly rigorous standards before it can be found to have achieved true unitary status and be released from judicial supervision.

C. A School Board Must Show, By Clear And Convincing Evidence, That The Constitutional Violation Has Been Completely Remedied.

In a hearing to determine whether a school district has achieved unitary status, the error costs are not equal. Should the trial court erroneously find that the desegregation plan is still necessary, little harm will result. The court will continue supervision, the present injunction will remain in effect so long as the court is convinced it has not become inequitable, and the board

[1] For this and other reasons discussed below, there is a heavy burden upon a party who seeks dissolution of a permanent injunction. See Point II, p. 14 *infra*.

will be able to demonstrate its achievement of unitary status at some point in the future. A finding of unitary status, on the other hand, terminates the case and puts the plaintiffs back at square one, where they cannot gain any relief absent a fresh showing of discriminatory intent.

This Court has noted that when a court must choose between maintaining the status quo and taking an irreversible step, it is appropriate to require the party seeking a permanent change to prove its case by clear and convincing evidence. *Cruzan*, 58 U.S.L.W. at 4921; *Santosky v. Kramer*, 455 U.S. 745, 759 (1982). By that same reasoning, the "clear and convincing" evidence standard should be applied to a school board seeking a determination that it has achieved unitary status.

Ever since this Court's decision in *Green*, the term "unitary" has expressed the goal of school desegregation plans. While the term has never been precisely defined, prior desegregation cases suggest that a school district seeking to end court supervision must pass each of three distinct tests. First, it must have been in good faith compliance with the desegregation order for a substantial number of years. Since prolonged de jure segregation has been shown to have dramatic long-term effects on the social order of a region, even the most aggressive desegregation plan cannot effect a complete remedy in a brief period of time. The full cooperation of the board is indispensable for a successful transition to unitary status, and "reduces the possibility that a school system's compliance with court orders is but a temporary constitutional ritual." *Morgan*, 831 F.2d at 321. Several circuits have adopted this requirement. *See Ross v. Houston Independent School Dist.*, 699 F.2d 218, 225 (5th Cir. 1983); *Morgan*, 831 F.2d at 321 (1st Cir.); *Jacksonville Branch, NAACP v. Duval County*, 883 F.2d 945, 952 (11th Cir. 1989).

A second requirement is that the board show that it

has taken no recent action from which segregative intent can be inferred. Thus, if, at the hearing regarding whether the district has achieved unitary status, the plaintiffs show that recent board decisions have had segregative effects, the board should bear the burden of proving an absence of discriminatory purpose. The ability of a school board to make this showing, or the lack of any evidence of resegregation, would be strong corroborating evidence that the board has the good faith required by *Ross*, *Morgan* and *Duval County*. Further, this requirement is necessary for reasons of judicial efficiency, for any resegregation caused by the board may be the basis of future litigation to prove that intentional segregation has recurred. More generally, this standard is consistent with *Dayton II*'s imposition of a "heavy burden" on the school board to justify actions that continue the effects of the dual system. *Dayton II*, 443 U.S. at 538.

Third, the school board must demonstrate that the school board is "clean of every residue of past official discrimination." *Ross*, 699 F.2d at 225. This should not be confused with an unrealistic requirement that the board eliminate every minute vestige of prior discrimination, such as a slightly disproportionate presence of minority groups in some schools. It is clearly impossible to eliminate *every* vestige, and an attempt to do so would lead to the imposition of desegregation efforts long after they have ceased to generate remedial benefits. However, the continued presence of significant vestiges of segregation is plainly at odds with this Court's requirement that school boards eliminate "*all* vestiges of state-imposed segregation." *Milliken II*, 433 U.S. at 290 (emphasis added).

These standards are quite similar to those advocated by petitioner, *amicus* United States, and neutral *amici* Council of the Great City Schools et al. Brief of Petitioner at 16-18; Brief of the United States at 23-25; Brief of the Council of the Great City Schools et al. at 13-14. Our quarrel is not with the standards espoused by those parties, but rather with the lax application that petitioner and the United States suggest.

D. A District Is Not Unitary So Long As Residential Segregation Due To Past Discriminatory State Action Causes Neighborhood Schools To Be Predominantly Of One Race.

No one has disputed the trial judge's early finding that, prior to the intervention of the district court, "the [segregated] residential pattern . . . in the Oklahoma City school district ha[d] been set by law for a period in excess of fifty years." *Dowell v. School Bd. of Oklahoma City*, 219 F. Supp. 427, 433 (W.D. Okla. 1963). This Court has long recognized the influence that de jure school segregation, and school board policy in general, can have on residential patterns, and vice versa. *Swann*, 402 U.S. at 20-21; *Keyes v. School District No. 1*, 413 U.S. 189, 211-12 (1973). Many sociological studies have confirmed this view. *See, e.g.*, D. Pearce et al., *The Effect of School Desegregation on the Rate of Residential Desegregation in Large Cities* (Presented at the Annual Meeting of The American Sociological Association, San Antonio 1984);[2] Appendix, *Social Segregation and Residential Segregation: A Social Science Statement*, Brief of Respondents in *Columbus Bd. of Educ. v. Penick*, at 6a-9a (hereinafter cited as "*Columbus* Appendix").[3]

Modern research has established that residential segregation persists long after the contributory segregative state action has ended. *See Columbus* Appendix at

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[2] Since this document is not yet publicly available, a revised draft has been lodged with the Clerk for the convenience of the Court.

[3] The *Columbus* Appendix, signed by 38 social scientists from 27 separate institutions, summarizes the state of social science knowledge regarding school and residential segregation as of 1979.

5a, 16a-17a; Pearce et al. at 1. Petitioner's own expert witness, Dr. William Clark, acknowledged this fact, admitting that, once an area is predominantly Afro-American, it will remain such for many years because white families are strongly disinclined to move in. TR at 105-07.[4] Further, this Court recognized the long term viability of residential segregation in *Dayton II*, where it stated that, although a facially neutral neighborhood school policy was in effect, "[g]iven intentionally segregated schools in 1954, . . . the Court of Appeals was quite right in holding . . . that the system-wide nature of the violation furnished prima facie proof that current segregation in the Dayton schools was caused at least in part by prior intentionally segregative official acts." *Dayton II*, 443 U.S. at 537.

The Fifth Circuit has repeatedly cautioned against hasty findings of unitary status while residential segregation continues to cause neighborhood schools to be almost exclusively minority. Even where an original desegregation order was entered in 1969, the Fifth Circuit found, seventeen years later, that residential segregation remained "a vestige of past segregative practices by the Board." *U.S. v. Lawrence County School Dist.*, 799 F.2d 1031, 1043-44 (5th Cir. 1986). Therefore, the Fifth Circuit has held, the existence of "virtually one-race schools . . . is inconsistent with the achievement of unitary status," *Lee v. Tuscaloosa City School Sys.*, 576 F.2d 39, 41 (5th Cir. 1978), and that a district seeking unitary status "must demonstrate . . . that 'current segregation is in no way the result of [its] past segregative actions.' " *Ross*, 689 F.2d at 225, quoting *Keyes*, 413 U.S. at 211 n.17; *Lawrence County*, 799 F.2d at 1044.[5]

Given the uncontested fact that in this case severe

[4] References to the Trial Record are abbreviated as TR.

[5] *U.S. v. Overton*, 834 F.2d 1171 (5th Cir. 1987), is not to the contrary, as that panel of the Fifth Circuit gave preclusive effect to a past, unappealed dismissal of the case. The panel did not, therefore, review the basis for the finding of unitary status.

residential segregation persists in the same area in which it was created, petitioner could not and did not make this essential showing. The Tenth Circuit properly set aside the district court's finding to the contrary as clearly erroneous.

E. A School System That Is Temporarily Operating In A Unitary Fashion Has Not Necessarily Achieved Unitary Status.

Some judges have used the term "unitary" to describe a school district which, due to the implementation of a mandatory desegregation, is operating in a non-discriminatory fashion. A finding to that effect indicates that the continuing presence of the injunction acts as a complete remedy. At this point, the court is justified in terminating its active supervision of the case, and the plaintiffs may not contest the remedy as inadequate.

A school district which is operating in a unitary fashion through continued enforcement of a court order is quite different, however, from a district which would operate in a non-discriminatory fashion even if *all* desegregation efforts were immediately halted. The Eleventh Circuit has distinguished these two situations:

> Some confusion has been generated by the failure to adequately distinguish the definition of a "unitary" school system from that of a school district which has achieved "unitary status." . . . [A] unitary school system is one which has not operated segregated schools as proscribed by cases such as *Swann* and *Green* for a period of several years. A school system which has achieved unitary status is one which is not only unitary but has eliminated the vestiges of its prior discrimination and has been adjudicated as such through proper judicial procedures.

Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1413 n.12 (11th Cir. 1985).

The terms of the 1977 decree terminating jurisdiction over this case indicate that the district court did not find that the Oklahoma City school system had achieved unitary status. Rather, the finding was merely that, fourteen years after the court found that the Board was operating a dual system, the system was finally operating in a unitary fashion, so the court could end its active supervision. The decree did not dissolve the injunction, and explicitly stated the district court's understanding that "termination of its jurisdiction will [not] result in the dismantlement of the plan." *Dowell v. School Bd. of Oklahoma City*, No. CIV-9452, slip op. at 1 (W.D. Okla. 1977), quoted in *Dowell v. School Bd. of Oklahoma City*, 795 F.2d 1516, 1519 (10th Cir. 1986), *cert. denied*, 479 U.S. 938.[6]

II PETITIONER HAS NOT DEMONSTRATED THAT THE INJUNCTION HAS FULFILLED ITS PURPOSE SUFFICIENTLY TO ALLOW ITS DISSOLUTION

A. Petitioner Is Required To Show At Minimum That It Has Eliminated The Harm That Led To The Injunction, And That There Is No Significant Risk That This Harm Will Recur.

[6] Since this issue is important only to the parties in this case, resolution of whether or not that decree indicated a finding of what this Court understands to be unitary status, and its preclusive effect, if any, may best be left to the Tenth Circuit on remand, after this Court has supplied that circuit with a precise definition of unitary status. This suggestion is echoed by *amicus* United States. Brief of the United States at 21-22.

Since *Brown v. Bd. of Educ.*, 349 U.S. 298 (1955) (*Brown II*), this Court has consistently held that desegregation orders, like all injunctions, are governed by traditional equitable principles. *Brown II*, 349 U.S. at 300. Thus, in considering the standard for dissolution of these injunctions without the consent of the prevailing party, *Brown II* indicates that the starting point is this Court's prior decision in *Swift*. Although *Swift* concerned the continued effect of an antitrust injunction, not a school desegregation plan, there are several principles emanating from *Swift* that are generally applicable.

First, *Swift* makes clear that equitable decrees, like all other results of litigation, are entitled to strong *res judicata* effect. At a minimum, "*Swift* holds that [an injunction] may *not* be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." *U.S. v. United Shoe Machinery*, 391 U.S. 244, 248 (1968) (emphasis in original). The defendants may not attack the injunction collaterally after it becomes final. "The injunction, whether right or wrong, is not subject to impeachment in its application to conditions that existed at its making." *Swift*, 286 U.S. at 119.

Second, *Swift* was explicitly concerned with the risk that the circumstances that required the injunction would recur if it were dissolved. "The inquiry for us is whether the changes [in circumstances] are so important that dangers, once substantial, have become attenuated to a shadow." *Id.* While the requirement that the danger of recurrence be "attenuated to a shadow" may seem an unduly harsh standard to impose on a public body, a court certainly is not justified in dissolving an injunction if a significant risk remains that inner-city schools will revert to their former separate and unequal status.

To be sure, *Swift* recognizes that unforeseen circumstances can make the most carefully considered

injunction inequitable. Should this occur, the proper recourse for the court is to modify the injunction so it may better accomplish its purpose, not to dissolve it prematurely, unless that is the only way to remedy the inequity. Since some aspects of the present injunction may have become inequitable, the Tenth Circuit properly remanded the case to the trial court to consider if modification is appropriate. *Dowell*, 890 F.2d at 1505-06.

In sum, *Swift* teaches that a court is justified in dissolving an injunction only if the injunction has fully accomplished its purpose and no significant risk remains that the injuries that led to its imposition will recur. No such showings have been made by petitioner.

B. Public Policy Requires That Courts Not Dissolve An Injunction Without The Consent Of The Prevailing Party Unless The Injunction Has Fully Accomplished Its Purpose.

The doctrine of *res judicata* promotes fairness by ensuring that parties who have had a full opportunity to litigate an issue are bound by the result, *Federated Department Stores v. Motie*, 452 U.S. 394, 401 (1981), and conserves judicial resources by decreeing an end to litigation. *Blonder-Tongue Laboratories v. University Foundation*, 402 U.S. 313, 324-25 (1971), quoting *Bruszewski v. U.S.*, 181 F.2d 419, 421 (3rd Cir. 1950); *Federated Department Stores*, 452 U.S. at 401-02. Consequently, this Court has adopted a policy of "rigorous application of *res judicata*." *Id.* at 400.

The concern about fairness is particularly strong in this case, as the defendants are essentially demanding the right to re-litigate the extent of the injunction. This Court has frequently stated its unqualified opposition to allowing parties to re-litigate, even in cases where the original judgment was wrong. *Id.* at 398-99. If petitioner

felt that the terms of the 1972 injunction would cause it to last too long, it should have sought a time limitation on direct appeal. There is no evidence that petitioner did so, and the Tenth Circuit's opinion on the appeal from the 1972 order, *Dowell v. School Bd. of Oklahoma City*, 465 F.2d 1012 (10th Cir. 1972), *cert. denied*, 409 U.S. 1041, does not discuss the issue. Having failed to raise this issue on direct appeal, petitioner is therefore barred from asserting it now. *Reed v. Allen*, 286 U.S. 191, 198-99 (1932); *Federated Department Stores*, 452 U.S. at 400.[7]

The adoption of permissive standards for the dissolution of an injunction would create an unnecessary burden on judicial resources. If a civil rights injunction is subject to dissolution once its purposes have been "substantially" achieved, enjoined parties could repeatedly return to court to argue that they are now "close enough." Similarly, if this Court allows dissolution despite significant risks of a recurrence of the injuries that created the need for an injunction, the groundwork would be laid for future litigation over whether a constitutional violation has recurred.

Maintaining rigorous standards for the dissolution of an injunction, by contrast, provides the certainty that parties need to order their affairs without repeated resort to the courts to clarify their rights and obligations. Courts would only be involved on the rare occasion that circumstances have changed to such a degree that the injunction has become inequitable, or when the injunction has been so successful that it may be dissolved. In this case, for instance, the desegregation plan was in place for eight years without the parties going to court once.

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[7] *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 437 (1976), is not to the contrary. There, the intervening decision by this Court in *Swann* was found to have created a sufficient change in the legal climate to justify a modification of the injunction even though it was not appealed. *Spangler*, 427 U.S. at 437-38. No such change in the law or facts has occurred in this case.

C. The Present State Of Segregation In Housing And Education In Oklahoma City Indicates That The Foregoing Standards Have Not Been Met.

In this case, petitioner has shown neither complete achievement of the purposes of the injunction nor the absence of a significant risk of a recurrence of separate and unequal schools. In Oklahoma City, children in the area once served by all-black schools now attend schools more than 96% black, while 13 formerly all-white schools are once again more than 80% white. Compare *Dowell*, 338 F. Supp. 1256 at 1260 (W.D. Okla. 1972), *aff'd*, 465 F.2d 1012 (10th Cir. 1972), *cert. denied*, 409 U.S. 1041, with *Dowell v. School Bd. of Oklahoma City*, 677 F. Supp.1503, 1509-10 (W.D. Okla. 1987), *rev'd*, 890 F.2d 1483 (10th Cir. 1989), *cert. granted*, 108 L.Ed 2d 761 (1990). Under the present "neighborhood schools" policy, 40% of the Afro-American students in grades 1-4 in Oklahoma City are attending schools that are 90% black. Plaintiff's exhibits 26, 27. Thus, dissolution of the injunction would mean that, after proving that the defendants engaged in pervasive constitutional violations with major detrimental impact on the Afro-American community in Oklahoma City, the plaintiffs did not achieve the elimination of the vestiges of that illegal action. Rather, they accomplished only a suspension of its effects for twelve years. This kind of hollow victory would discourage the victims of discrimination from seeking to vindicate their rights.

Afro-American students are once again in 90% black classes in the same buildings where the white majority isolated their parents with inferior educational opportunities. Given the insulation of the children of the white majority from deterioration of the virtually all-black schools, the difficulty of proving discriminatory intent, and the sad history in this country of district after district neglecting the education of minority youth, there is a clear risk of reversion to separate and unequal

schools. Equitable injunctions cannot be dissolved in the presence of such a risk. "Whether the defendants would resume that practice . . . we do not know. . . . [Their position] carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past." *Swift*, 286 U.S. at 116.

III AGGRESSIVE DESEGREGATION EFFORTS ARE REQUIRED IF INNER CITY MINORITY CHILDREN ARE TO HAVE ACCESS TO EQUAL EDUCATIONAL OPPORTUNITIES

A. Modern Research Has Shown That, Over The Long Term, School Desegregation Helps To Break The Cycle Of Racial Isolation In The Lives Of Minority Students And In Our Society As A Whole.

Ever since school desegregation was first mandated in *Brown I*, few areas of constitutional law have provoked as much controversy and resistance. This Court has been forced to strike down various techniques developed by state authorities to undermine the goals of desegregation. *See, e.g., Cooper v. Aaron*, 358 U.S. 1 (1958) (state denial of this Court's authority); *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218 (1964) ("privatization" of public schools); *Green* ("freedom of choice" plan that perpetuated 100% segregation); *Wright* (subdivision of school district to isolate predominantly white area from a desegregation plan); *North Carolina Bd. of Educ. v. Swann*, 402 U.S. 43 (1971) (state anti-busing law). For a partial list of similar cases in the lower courts, see *Green*, 391 U.S. at 423 n.1.

After *Swann* and its companion cases established that desegregation was constitutionally required to the maximum extent practicable, opponents of desegrega-

tion have continually sought to show that desegregation is impracticable and serves no remedial purpose.[8] This argument is premised on the notion that a neighborhood school policy is better for minority students than a desegregation plan, even in cities with pronounced residential segregation.

But, starting with *Brown I*, this Court rejected the argument that separate can be equal. The *Brown I* court recognized that for minority students, "[separation] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown I*, 347 U.S. at 494. This statement applies with only slightly less force to cities where an official policy of segregation is no longer present. *Keyes*, 413 U.S. at 229-30 (Powell, J., concurring in part and dissenting in part).

To support its conclusion, the *Brown* Court cited a series of preliminary studies that demonstrated that segregated education offers black students inferior opportunities. *Brown I*, 347 U.S. at 494 n.11.[9] The great weight of modern research reaffirms this view. This result does not in any way stem from a belief that minority children cannot learn without sitting next to white children. Rather, the dominant factors are the presence of children of a higher socioeconomic status, U.S. Office of Education, *Equality of Educational Opportunity* at 22 (1966),[10] as well as the tendency of children of both races

[8] For a discussion of early efforts to discredit desegregation, see W. Hawley, *The New Mythology of School Desegregation*, 42 Law & Contemp. Probs., Autumn 1978, at 214. In this case, the argument is made in the Brief of Landmark Legal Foundation as *Amicus Curiae* in Support of Petitioner. However, the studies cited by that brief do not support Landmark's view that desegregation plans like the one abandoned by petitioner serve no educational purpose. See note 16 *infra*.

[9] Some of the research cited by the Court was originally sponsored by *amicus* American Jewish Committee.

[10] This study, written by Dr. James Coleman at the request of Congress, is commonly known as the *Coleman Report*.

who learn in an integrated environment to stop perpetuating the patterns of racial segregation and prejudice so prevalent in all aspects of our society. J. Braddock et al., *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, 66 Phi Delta Kappan 259, 262 (1984).[11]

Most importantly, school desegregation helps to break the cycle of segregation that continues to permeate our society. Minority students who live in highly segregated communities and attend schools that are almost exclusively minority have little contact with other elements of the society during their youth. They therefore lack both the confidence that they can succeed in integrated situations and the understanding of the majority culture that results from an integrated education. Braddock et al. at 262; J. Braddock and J. McPartland, *Socio-Pyschological Processes That Perpetuate Racial Segregation*, 19 J. of Black Studies 267, 285-86 (1989) (hereinafter cited as "Braddock and McPartland I"). Consequently, they are far more likely than desegregated students to attend a segregated college (if they attend one at all), to live in a segregated neighborhood, and to have few white friends and co-workers. Braddock et al. at 260-62. *See also Columbus* Appendix at 12a-13a; U.S. Civil Rights Commission, *Racial Isolation in the Public Schools* at 114 (1967). A recent study of graduates in a unique controlled experiment in Hartford, Connecticut confirmed these findings. R. Crain et al., *Finding Niches: Desegregated Students Sixteen Years Later* (draft final report 1989), at 28, 78.[12]

Desegregation improves minority employment opportunities. Since most employers rely heavily on informal social networks to fill jobs, J. Braddock and J.

[11] This article is a summary of 10 studies involving the work of eight social scientists.

[12] Since this document is not yet publicly available, a copy has been lodged with the Clerk for the convenience of the Court.

McPartland, *How Minorities Continue to Be Excluded From Equal Employment Opportunity: Research on Labor Market and Institutional Barriers*, 43 J. of Social Issues 5, 7 (1987), minority citizens are significantly less likely to be considered for jobs by white employers if, due to a segregated education, they are isolated from social contact with whites. *Id.* at 9. Studies have also shown that white employers are more likely to hire a minority applicant from a desegregated high school than one from a segregated, inner-city high school. *Id.* at 19. Since most predominantly minority jobs have less prestige and pay lower salaries than other jobs, segregated schooling therefore perpetuates the economic inferiority of minority citizens. Braddock and McPartland I at 278.

Desegregation also has important effects on white citizens. Despite occasional racial conflicts, studies have shown that, overall, the contacts they and their children have with minority groups in schools lead to greater racial tolerance and understanding among whites, Braddock et al. at 262, and make them more likely to live in integrated neighborhoods and have black friends. *Columbus* Appendix at 12a-13a. Desegregation has no adverse effect on white academic achievement. *Id.* at 21a; Committee on the Status of Black Americans, *A Common Destiny: Blacks and American Society* at 374 (1989).

Further, just as segregative school policies can lead to residential segregation, school desegregation produces the opposite effect, encouraging integrated neighborhoods. *Columbus* Appendix at 9a; Pearce et al. at 19. When a desegregation plan prevents any schools from being identified as a "white" school or a "black" school, white parents cannot move to a segregated neighborhood in order to send their children to a predominantly white school. *Id.* at 2-3. Further, school desegregation allows minority families more mobility, because it ensures that theirs will not be the first non-white faces seen in a neighborhood. *Id.* at 2

Recent studies have confirmed that the integrative effect of desegregation is dramatic. A survey of 25 cities found that the extent of residential desegregation was closely related to the extent of school desegregation. *Id.* at 19. Overall, the rate of residential desegregation was *nine times* greater in cities with school desegregation plans than in cities without them. *Id.*

Unfortunately, absent continued school desegregation efforts, these findings cast strong doubt on the long-term viability of the integrated neighborhoods in Oklahoma City that arose while the Finger plan was in effect. If the elementary schools of Oklahoma City continue to be run on a neighborhood basis, the trend towards residential integration will slow and may well reverse itself as parents once again are able to control the racial composition of their children's school.[13] This precise effect was noted by the District Judge earlier in this case: "[I]nflexible adherence to the neighborhood school policy . . . serves to maintain and extend school segregation by extending areas of all Negro housing, destroying in the process already integrated neighborhoods and thereby increasing the number of segregated schools." *Dowell v. School Bd. of Oklahoma City*, 244 F. Supp. 971, 976-77 (W.D. Okla. 1965), *aff'd*, 375 F.2d 158 (10th Cir. 1967), *cert. denied*, 387 U.S. 931 (1967); *see also Dowell*, 219 F. Supp. at 434. The destabilizing effect of "neighborhood school" plans has been noted in the literature. *Columbus* Appendix at 8a-9a; Pearce et al. at 2-3, 18-19.

B. School Desegregation Improves Minority Student Academic Achievement.

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[13] Although school desegregation for younger students has been halted for five years in Oklahoma City and Norfolk, Va., *Riddick v. School Bd. of City of Norfolk*, 784 F.2d. 521, *cert. denied*, 519 U.S. 938 (1986), the data to test this theory will not be available until the results of the 1990 census are published.

The positive short-term effects of school desegregation have also been amply verified by a series of conclusive studies. An analysis of the results of 73 studies revealed that the academic achievement of minority students who are desegregated by first grade rises substantially. *Columbus* Appendix at 23a-24a.[14] In sharp contrast, however, students who are desegregated in later years show no improvement in achievement. *Id.* As noted above, white student achievement is not affected.

These findings, supported by other data, *see id.* at 24a, are attributable to the segregated social patterns that children quickly develop during years of segregated education.[15] *Id.* at 23a-24a. For the same reasons that graduates of segregated schools have difficulty integrating into society as a whole, students who begin their schooling in segregated environments remain isolated from children of other races when they are later placed in the same classroom. This Court has recognized the cultural barriers that arise when children who are educated in isolation are thrust into an integrated setting. *Milliken II*, 433 U.S. at 287-88. Therefore, Oklahoma City's decision to postpone integration until grade five is not a mere minor delay, but rather a decision that is bound to have major negative repercussions on the overall success of desegregation.[16]

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[14] This study was subsequently published as R. Crain and R. Mahard, *Desegregation and Black Achievement: A Review of the Research*, 42 Law & Contemp. Probs., Summer 1978, at 17.

[15] These findings were challenged at trial, based on papers appearing in National Institute of Education, *School Desegregation and Black Achievement* (1984). These papers, never published in a refereed journal, TR at 995, 997, analyzed a subset of 19 of the 93 studies and found that desegregation had no effect on academic achievement. However, all but one of the studies in this subset concerned districts in which desegregation occurred after several years of segregated education. TR at 996. Thus, the findings of those studies do not in any way conflict with the results reported in Crain and Mahard. *Id.*

[16] *Amicus* Landmark Legal Foundation seeks to show that desegregation has no educational benefits. Landmark, however, cites

Finally, desegregation has been shown to help

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only two scientific studies to support that claim. Neither of these citations is persuasive.

Landmark cites *School Desegregation and Black Achievement*, note 15 *supra*, for the proposition that "desegregation has small positive effects on black student achievement in reading and no effects on black achievement in math." Landmark Brief at 16. However, as discussed in note 15 *supra*, all but one of the groups of students analyzed in this study were desegregated after years of segregated schooling. Thus, as was pointed out five years earlier in the *Columbus* Appendix, no gains in black student achievement were to be expected. *Columbus* Appendix, at 23a-24a. The results of the cited study therefore do not apply to a desegregation plan that begins in first grade, as the plan in Oklahoma City did until that crucial feature was unilaterally abandoned by petitioner.

Landmark relies on *A Common Destiny* to support two additional assertions. First, it states that "[d]espite nearly three decades of forced busing, 'there remains a persistent and large gap' between black and white [achievement]," Landmark Brief at 15-16, quoting *A Common Destiny* at 378. Second, it claims that studies reported in *A Common Destiny* have shown both that desegregation harms black aspirations and that "blacks in non-integrated schools have higher self-esteem than blacks in integrated schools". Landmark Brief at 16, citing *A Common Destiny* at 373-74. Both citations to this report, prepared by a distinguished panel of 22 experts from 20 different institutions under the auspices of the National Research Council, are taken selectively out of context and in fact are contrary to the explicit conclusions of *A Common Destiny*. While *A Common Destiny* did note the presence of a black/white achievement gap, it found that "over a relatively short period from 1970 to 1980, the gap between average performance of white and black school children narrowed appreciably." *Id.* at 351. School desegregation was identified as a "contributing factor" in this accomplishment. *Id.* at 350.

Regarding the psychological effects of desegregation, *A Common Destiny* concluded that "findings on the self-esteem and educational aspirations of black children in desegregated schools are so diverse that overall generalizations are not warranted." *Id.* at 373. Overall, the authors found that school desegregation "modestly improves black performance (particularly reading)" and that "when several key conditions are met, intergroup attitudes and relations improve after schools are desegregated." *Id.* at 379. It is therefore puzzling why Landmark believes that *A Common Destiny* supports its conclusion that desegregation "detracts from the educational mission." Landmark Brief at 10.

break the recurring tragic pattern of teenage girls becoming pregnant and terminating their education, leaving them as unwed, unprepared and uneducated mothers. Research has shown that desegregated female students tend to delay their first sexual experiences, F. Furstenberg et al., *Race Differences in the Timing of Adolescent Intercourse*, 52 American Sociological Review 511, 515 (1987), and become teenage mothers less often. Crain et al. at 28-29, 77.

Taken as a whole, the research cited herein reveals two critical facts. First, the effects of school segregation on minority students and on the residential complexion of a city are dramatic, and may well provide a partial explanation for some of the discrepancies between white and minority citizens in this country. Second, continuing desegregation efforts have important beneficial effects, and remain an essential part of the remedy for past segregation. Thus, school desegregation has been proven to successfully remedy illegal past de jure segregation while promoting the "central *educational* function of the schools." *Milliken v. Bradley*, 418 U.S. 717, 764 (1974) (*Milliken I)* (White, J., dissenting) (emphasis in original). While local control of school districts remains an important consideration, it must give way to the need to provide a complete remedy for the past constitutional violations in Oklahoma City.

CONCLUSION

For the foregoing reasons, we urge this court to affirm the decision of the Tenth Circuit in its entirety.

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Respectfully submitted,

SAMUEL RABINOVE
Counsel of Record
RICHARD T. FOLTIN
The American Jewish Committee
165 East 56th Street
New York, New York 10022
(212) 751-4000
*Attorneys for Amici Curiae**

Of Counsel:

WILLIAM B. DUFFY, JR.
Burns & Levinson
125 Summer Street
Boston, MA 02110

RUBEN FRANCO
Puerto Rican Legal Defense and Education Fund
99 Hudson Street
New York, NY 10013

STANLEY MARK
Asian American Legal Defense and Education Fund
99 Hudson Street
New York, NY 10013

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